STATE OF MICHIGAN

COURT OF APPEALS

RICHARD F. MAZUR,

Plaintiff-Appellant,

and

JAMES R. BOUWMAN,

Plaintiff,

v

KERRY KAMMER, KTK INC, and THOMAS P. RABETTE,

Defendants-Appellees.

UNPUBLISHED
May 8, 2008

No. 275298
Oakland Circuit Court
LC No. 2005-066979-CK

Before: Kelly, P.J., and Owens and Murray, JJ.

PER CURIAM.

Plaintiff Richard F. Mazur appeals as of right the final order of Oakland Circuit Court Judge Steven N. Andrews dismissing his claims against defendants Kerry Kammer, Thomas P. Rabette, and KTK Inc. We affirm the trial court's January 11 order granting summary disposition of plaintiffs' minority oppression and breach of fiduciary duties claims, its order denying plaintiffs' motion to file an amended complaint, its order denying plaintiffs' motion for clarification, and its order authorizing the sale of the property. We reverse the trial court's October 16 order entering a default judgment against Mazur and dismissing the remainder of his claims and remand this case for further proceedings consistent with this opinion.

I. Facts and Procedural History

Plaintiffs Richard F. Mazur and James R. Bouwman, defendant Kerry Kammer and non-party Kelly Kammer are Michigan businessmen.[1] Defendant Thomas Rabette is an attorney

[1] Kerry and Kelly Kammer are brothers. For the sake of clarity, we will refer to them by their first names in this opinion.

licensed in the state of Michigan. Apparently the men worked together on several business ventures. In 1991, these men created KTK, Inc., as a vehicle to purchase an over 400-acre tract of land in Saginaw County and develop a hunting camp. The parties purchased the hunting camp, named "Antlers Hunt Club," for recreation, not as an investment. Although KTK owned the hunting lodge, each shareholder held a 20 percent interest in the corporation.

The original shareholders' agreement, dated October 25, 1991, was replaced and superseded by an amended shareholder agreement in 1997. The amended shareholder agreement specified that within 12 months of a shareholder's death or long-term total disability "as declared by the Shareholder and confirmed by independent medical evidence," KTK was required to purchase all the shares of stock held by that shareholder for the fair market value of those shares or for another value agreed on by all shareholders. The amended shareholder agreement also detailed the circumstances under which a shareholder who had not died or suffered long-term total disability could either sell his shares to the corporation or offer to purchase the shares of another shareholder. The agreement prohibited a shareholder from transferring his shares without the prior written consent of the corporation or without first complying with the restrictions included in the corporate bylaws, and it specified that any transfer of shares in violation of the agreement would be void.

In 1998, Kelly decided to sell his shares of KTK to Kerry in exchange for the discharge of particular debts. On September 1, 1998, Rabette, Mazur, Kerry, and Kelly signed a resolution permitting the sale of Kelly's shares to Kerry. Bouwman did not sign the resolution. Two weeks later, Kelly transferred his shares to Kerry for $125,000.

Apparently relations between the individual parties soured in the late 1990s and early 2000s, and Kerry and Rabette began considering ways to sell the property or otherwise end the parties' joint recreational venture. They claimed that Bouwman and Mazur mentioned at various points in 2003 that they also wanted to sell the property. Mazur, however, did not want to sell the property and he and Bouwman commenced this litigation to keep them from doing so. In their complaint, plaintiffs alleged claims of minority oppression, breach of contract, fraud, and breach of fiduciary duties against both Kerry and Rabette in their roles as partners in KTK and against Rabette individually in his role as an attorney for the corporation.

On January 11, 2006, the trial court granted in part and denied in part defendants' motion for summary disposition of these claims. It determined that because KTK's amended shareholder agreement required KTK to purchase all shares held by a shareholder upon his death or disability, and because the September 1998 resolution authorizing Kerry to purchase Kelly's stock contradicted the dictates of the shareholder agreement and was not adopted by unanimous approval, the resolution was invalid and each shareholder still had an equal voice in the corporation. The trial court also determined that plaintiffs presented sufficient evidence to support their contention that defendants' attempt to sell KTK's property constituted a breach of the parties' agreement that each individual shareholder would have an equal voice in the corporation. It denied defendants' motion for summary disposition on plaintiffs' claim of fraud after concluding that plaintiffs presented sufficient evidence to create a question of fact regarding whether defendants misrepresented the nature of the stock transfer from Kelly to Kerry and whether plaintiffs were aware of the alleged fraud. However, the trial court granted defendants' motion for summary disposition of plaintiffs' breach of fiduciary duties claims against Rabette

pursuant to MCR 2.116(C)(8) and (10) and for summary disposition of defendants' minority oppression claim pursuant to MCR 2.116(C)(10).

Despite the ongoing litigation, defendants continued to attempt to take control of the corporation in order to sell the property. In particular, Kerry, Kelly, and Rabette agreed to adopt new bylaws, elect Kerry and Rabette directors of the corporation, and remove plaintiffs from their positions as directors of the corporation. Kerry and Rabette also signed an agreement authorizing the corporation to list the property for sale and to sell it at the best available price. On April 3, 2006, Rabette filed a notice of impending dissolution of the corporation with the Michigan Department of Labor and Economic Growth. In light of defendants' continued efforts to control the corporation, the trial court granted plaintiffs' motion for the appointment of a receiver and appointed attorney Bruce Leitman to the position, although it precluded Leitman from selling corporate property absent further order of the court.

Defendants filed a second motion for summary disposition of plaintiffs' breach of contract and fraud claims, which the trial court denied on May 31, 2006. The trial court noted that although it had concluded in its January 11 order that Kelly's attempted transfer of shares to Kerry was ineffective and, as such, Kerry did not hold a 40 percent stake in KTK, it had also determined that Kelly's failed attempt to transfer his shares to Kerry did not mean that Kelly had relinquished his shares to the corporation and that the individual parties had increased their proportional ownership of KTK. Instead, Kelly and the individual parties each continued to hold a 20 percent interest in the corporation. The trial court then determined that after the January 11 order was issued, defendants still attempted to assert control over the corporation in contravention of the parties' agreement, and that plaintiffs presented sufficient evidence to establish that they suffered damage as a result of defendants' allegedly wrongful actions. The trial court also denied defendants' motion for summary disposition of plaintiffs' fraud claim after concluding that a question of fact existed regarding whether defendants misrepresented the nature and purpose of the stock transfer from Kelly to Kerry and the extent of plaintiffs' knowledge of the alleged fraud.

In May 2006, a third party offered to purchase the property for $1.25 million. On June 30, 2006, the corporation entered into a buy and sell agreement to sell the property to the third party, and the trial court ordered the receiver to proceed with the proposed sale of the property on July 12, 2006.

In August 2006, the trial court granted the motion of plaintiffs' counsel to withdraw as counsel of record and adjourned the trial in this case until October 16, 2006. On September 27, 2006, Mazur moved in propria persona for voluntary dismissal of his complaint without prejudice, without costs, and subject to reinstatement at some future time. Defendants challenged the motion, instead requesting that the trial court dismiss plaintiffs' complaint with prejudice and with costs and attorney fees assessed against plaintiffs. Regardless, plaintiff filed a proposed order to dismiss the case on October 9, 2006, which defendants again challenged.

Mazur did not appear at the scheduled October 16, 2006, hearing. When the trial court inquired regarding Mazur's whereabouts, Rabette replied, "Judge, Mr. Garrett, although he doesn't represent Mr. Mazur, indicated that Mr. Mazur would not be appearing this morning. He—that's, that's all, that's all we have. I don't know the basis." Although the trial court called the case at 8:42 a.m., he gave Mazur until 9:00 a.m. to appear. When the trial court reconvened

at 9:00 a.m., the court indicated that it had reviewed the file and noted that although Mazur had the right to, and wished to, take a voluntary dismissal in the case, the trial court still needed to fix costs. When the trial court learned that Mazur had not contacted the court clerk that morning regarding his whereabouts, it dismissed the case. It also issued the following order:

> This matter having appeared before the court for trial pursuant to notice and order therefore, and plaintiff Mazur having failed to appear, defendants having appeared with their counsel:
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> > Plaintiff Mazur is defaulted for his failure to appear, and plaintiffs' second amended complaint and all claims therein are hereby dismissed with prejudice, with costs, attorney fees and sanctions in an amount to be determined by the court upon the defendants' motion therefore which shall be filed herein within 28 days.[2]

After Mazur retained new counsel, he moved to set aside the default judgment against him and to modify the trial court's October 16, 2006, order. The trial court denied Mazur's motion, stating that Mazur had failed to demonstrate good cause to set aside the default. The trial court also granted defendants' motion for case evaluation sanctions and for costs and attorney fees as sanctions against Mazur for pleading a frivolous claim.

II. Summary Disposition

Mazur argues that the trial court erred when it granted summary disposition in favor of defendants with regard to plaintiffs' minority oppression and breach of fiduciary duties claims. We disagree. We review de novo a trial court's grant of summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

A. Breach of Fiduciary Duties by Kerry and Rabette

First, Mazur argues that the trial court's decision to grant summary disposition of plaintiffs' breach of fiduciary duties claim against Kerry and Rabette was erroneous because Kerry and Rabette owed him and Bouwman fiduciary duties separate from those owed to the corporation. However, the trial court's dismissal of this cause of action was essentially based on its conclusion that plaintiffs lacked standing to bring this claim. This Court has held, "[t]he doctrine of standing provides that a suit to enforce corporate rights or to redress or prevent injury to a corporation, whether arising from contract or tort, ordinarily must be brought in the name of the corporation, and not that of a stockholder, officer, or employee." *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 474; 666 NW2d 271 (2003).

However, Michigan courts have recognized two exceptions under which a shareholder in

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[2] Pursuant to a stipulation between defendants and Bouwman, the trial court dismissed Bouwman's claims with prejudice pursuant to the terms of the September 29, 2006, settlement agreement.

a corporation may bring a cause of action on his own behalf. First, "'[a] stockholder may individually sue corporate directors, officers, or other persons when he has sustained a loss separate and distinct from that of other stockholders generally.'" *Christner v Anderson, Nietzke & Co, PC*, 433 Mich 1, 9; 444 NW2d 779 (1989), quoting *Christner Anderson, Neitzke & Co, PC*, 156 Mich App 330, 344-345; 401 NW2d 641 (1986), quoting 19 Am Jur 2d, Corporations, § 2245, p 147. Second, a shareholder may individually sue corporate officers and directors if he "can show a violation of a duty owed directly to [him] that is independent of the corporation." *Belle Isle Grill Corp, supra* at 474, citing *Michigan Nat'l Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989). However, a shareholder cannot sue on his own behalf "merely because the acts complained of resulted in damage both to the corporation and to the individual." *Michigan Nat'l Bank, supra* at 679-680. Instead, the shareholder's right to individually sue corporate officers and directors "is limited to cases where the wrong done amounts to a breach of duty owed to the individual personally." *Id.* at 680. "Thus, where the alleged injury to the individual results only from the injury to the corporation, the injury is merely derivative and the individual does not have a right of action against the third party." *Id.*

Mazur argues that the effect of the loss of the hunting camp on him constituted a loss that was separate and distinct from the loss suffered by the corporation because he was elderly and, therefore, he benefited more from the heated deer blinds and well-equipped lodge at the hunting camp than defendants, who were younger and still had the agility and physical endurance to walk long distances through the woods and hunt in less comfortable surroundings. Mazur also claims that unlike defendants, he is too old to develop another hunting camp.

Yet although Mazur describes how the loss of the hunting camp will affect him differently than it will affect defendants, the individual loss he identifies is the same as the loss suffered by the corporation, namely, the loss of the hunting camp. Further, although Mazur makes unsubstantiated allegations that defendants failed to abide by agreements not to remove him from his position as a director of the corporation, to not embezzle funds, and to not illegally kill an eagle or otherwise subject him to liability, he again fails to identify an injury that he suffered that is distinct from that suffered by the corporation. The injury suffered by Mazur, the loss of the hunting camp, is derivative of the loss suffered by the corporation, and he does not have an individual cause of action against defendants. Accordingly, the trial court did not err when it dismissed his breach of fiduciary duties claims because he failed to identify an injury that was distinct from that suffered by the corporation.

Mazur also claims that he could maintain a cause of action for breach of fiduciary duties against defendants because a "special contractual duty" existed between him and defendants. However, the citation that Mazur includes in his brief does not support (or even address) his argument and he provides no other authority to support his position. Accordingly, Mazur's argument is waived and we need not consider it further. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

B. Breach of Fiduciary Duties by Rabette

Next, Mazur argues that the trial court erred when it dismissed his breach of fiduciary duties claim against Rabette because a question of fact exists regarding whether an attorney-client relationship existed. However, we need not address this issue. Instead, we conclude that summary disposition was appropriate pursuant to MCR 2.116(C)(8) because plaintiffs failed to

state a claim on which relief may be granted. Plaintiffs based their cause of action on a violation of MRPC 1.8, relying entirely on this rule to establish that a breach of fiduciary duties occurred. However, this Court has recognized,

> [T]hough failure to comply with the requirements of [the MRPC] may provide a basis for invoking the disciplinary process, such failure does not give rise to a cause of action for enforcement of the rule or for damages caused by failure to comply with the rule. MRPC 1.0(b). [*Watts v Polaczyk*, 242 Mich App 600, 607 n 1; 619 NW2d 714 (2000).]

Plaintiffs attempted to establish in their complaint that Rabette breached his fiduciary duty of loyalty solely by alleging violations of the MRPC. Yet as noted by the *Watts* Court, according to MRPC 1.0(b) plaintiffs cannot bring a cause of action before the circuit court alleging that they suffered harm solely because defendants breached the MRPC. Therefore, plaintiffs failed to state a proper claim for which relief could be granted, and summary disposition pursuant to MCR 2.116(C)(8) is proper.

C. Minority Oppression

Finally, Mazur argues that the trial court erroneously granted summary disposition of his minority oppression claim after determining that MCL 450.1753 permitted the sale of corporate assets and that he and Bouwman were not minority shareholders in the corporation. Black's Law Dictionary (8th ed) defines a minority shareholder as "[a] shareholder who owns less than half the total shares outstanding and thus cannot control the corporation's management or singlehandedly elect directors." Each shareholder in KTK owns 20 percent of the stock in the corporation and, therefore, is a minority shareholder.

The trial court properly granted summary disposition of this cause of action pursuant to MCR 2.116(C)(8) because plaintiffs failed to establish a cause of action for minority oppression against defendants pursuant to MCL 450.1489.[3] MCL 450.1489(1) states in pertinent part,

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[3] Although plaintiffs did not refer specifically to this statute in their complaint, MCL 450.1489 is the statute authorizing a minority shareholder to bring a cause of action for minority oppression. Further, although the trial court granted defendants' motion for summary disposition under MCR 2.116(C)(10), Mazur essentially argues in his brief on appeal that the trial court should not have granted summary disposition to defendants because plaintiffs established a cause of action for minority oppression, which would preclude summary disposition under MCR 2.116(C)(8). "[W]here a party brings a summary disposition motion under the wrong subrule, the trial court may proceed under the appropriate subrule as long as neither party is misled." *Blair v Checker Cab Co*, 219 Mich App 667, 670-671; 558 NW2d 439 (1996). Moreover, "[a]n order granting summary disposition under the wrong subrule may be reviewed under the correct one." *Energy Reserves, Inc v Consumers Power Co*, 221 Mich App 210, 216; 561 NW2d 854 (1997). Therefore, we may uphold the trial court's grant of summary disposition of plaintiffs' minority oppression claim on the ground that plaintiffs failed to state a cause of action as required under MCR 2.116(C)(8).

> A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of *the directors or those in control of the corporation* are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder. . . . (Emphasis added.)

MCL 450.1489 only permits a shareholder to bring a cause of action against those in control of the corporation. Although Mazur claims that defendants control the corporation, he does not explain how Rabette and Kerry have control over the corporation when they collectively own only 40 percent of the shares. Although Kelly (a non-party in this case) owns 20 percent of the shares in the corporation and, by giving his proxy to Rabette and Kerry, has effectively ensured that he, Rabette, and Kerry control the corporation, plaintiffs failed to name Kelly as a defendant in this case, and Kerry and Rabette alone do not control the corporation. Accordingly, Mazur cannot establish a cause of action against Kerry and Rabette alone pursuant to MCL 450.1489 because Kerry and Rabette alone do not control the corporation.[4]

III. Motion to Amend Complaint

Mazur argues that the trial court erred when it declined to permit plaintiffs to file a third amended complaint. We disagree. We review a denial of a motion for leave to amend a pleading for an abuse of discretion. *Franchino v Franchino*, 263 Mich App 172, 189; 687 NW2d 620 (2004). "An abuse of discretion occurs when an unprejudiced person considering the facts upon which the decision was made would say that there was no justification or excuse for the decision." *City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 254; 701 NW2d 144 (2005). The trial court should specifically state its reason for denying a motion to amend on the record. *Weymers v Khera*, 454 Mich 639, 659; 563 NW2d 647 (1997).

Mazur argues that the trial court erred when it declined to permit plaintiffs to file a third amended complaint pursuant to MCR 2.118(A)(2) because any delay in plaintiffs' motion to amend the complaint would not result in prejudice to defendants. MCR 2.118(A)(2) states, "Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." This Court has noted,

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[4] Mazur references the unpublished case of *Lozowski v Benedict*, unpublished opinion per curiam of the Court of Appeals, February 7, 2006 (Docket No. 257219), to support his argument that each defendant named in a cause of action under MCL 450.1489 need not be a majority shareholder in the corporation. However, this case is distinguishable. In *Lozowski*, a panel of this Court determined that the plaintiff properly alleged a cause of action pursuant to MCL 450.1489 against the defendants because the defendants collectively held a majority of the corporation's shares and a majority of seats on the board of directors and, therefore, had control over corporate affairs. However, in this case, defendants collectively own the same number of shares in the corporation as plaintiffs, so defendants' "control" over the corporation exists only to the extent that Kelly agrees with defendants' actions.

> Motions to amend should be denied only for specific reasons such as "'[1] undue delay, [2] bad faith or dilatory motive on the part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [and 5] futility . . . .'" [*Franchino, supra* at 189-190, quoting *Weymers, supra* at 658, quoting *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973).]

The *Franchino* Court also stated,

> [D]elay alone does not justify denying a motion to amend. However, "a court may deny a motion to amend if the delay was in bad faith or if the opposing party suffered actual prejudice as a result." Actual prejudice results when an amendment prevents the opposing party from receiving a fair trial. [*Franchino, supra* at 191 (citations omitted).]

Although Mazur correctly notes that "delay alone does not justify denying a motion to amend," the trial court denied plaintiffs' motion to amend on the ground that it was untimely because plaintiffs made this motion after the discovery deadline had passed and approximately six weeks before the trial in this case was scheduled to begin. In our opinion, this constitutes undue delay. In addition, if defendants were required to address plaintiffs' amended complaint, they would have had to either research and prepare defenses for the allegations raised in the complaint in the six weeks preceding trial or they would have had to request that the trial be moved to a later date. Either scenario could have prevented defendants from receiving a fair trial and, therefore, constituted actual prejudice. Accordingly, the trial court did not abuse its discretion when it denied plaintiffs' motion to amend their complaint on the ground that it was untimely.

Mazur also argues that the trial court erred when it denied plaintiffs' motion to amend their complaint to add a claim for breach of fiduciary duties on the ground that this claim was futile. Plaintiffs based their proposed breach of fiduciary duties claim on the assertion that defendants had fiduciary duties toward plaintiffs arising from defendants' roles in the corporation. However, this proposed cause of action alleged the same wrongdoing as that alleged by plaintiffs in their original breach of fiduciary duties claim against defendants, which was dismissed by the trial court in its January 11, 2006, opinion and order. Accordingly, the trial court did not abuse its discretion when it determined that amendment of plaintiffs' complaint to include a cause of action that it had already dismissed would be futile.

IV. Motion for Clarification

Mazur argues that the trial court erred when it denied plaintiffs' motion for clarification of its January 11 and May 31 orders because the trial court presented conflicting conclusions regarding whether plaintiffs were minority shareholders in the corporation. He claims that the trial court should have clarified whether it believed that plaintiffs were minority shareholders because, if they were, then the trial court erred when it dismissed their minority oppression claim. As we discussed earlier, because each plaintiff only owns 20 percent of the shares of KTK, the trial court's statement in its January 11 order that each plaintiff was not a minority shareholder is incorrect. Yet although plaintiffs were minority shareholders in the corporation,

they still failed to establish a cause of action for minority oppression pursuant to MCL 450.1489 because defendants alone did not control the corporation. Accordingly, Mazur's argument regarding the need for clarification of the trial court's January 11 and May 31 orders is immaterial to the disposition of plaintiffs' minority oppression claim and we will not address it further.

V. Sale of Property

Mazur argues that the trial court erred when it authorized the sale of the property before it ruled on plaintiffs' claims that defendants committed fraud and breach of contract and their request for declaratory judgment. Specifically, he claims that the trial court did not have the authority to sell the property and that the court's order to sell the property before trial acted as an improper grant of summary disposition. Mazur fails to present any authority to support either his contention that the trial court's order to sell the property constituted an improper grant of summary disposition or that the trial court lacked the authority to order the sale of a corporate asset. Although Mazur includes a citation to *Solomon v Royal Maccabees Life Ins Co*, 243 Mich App 375; 622 NW2d 101 (2000), in his argument that the trial court's order to sell the property constituted an improper grant of summary disposition, he does not explain how this case supports his position, and we are unable to determine how the case relates to his argument.[5]

Further, although Mazur cites two cases from other states to support his argument that the trial court erred when it authorized the sale of the property, these cases concern the trial court's authority to dissolve a solvent corporation. However, in this case, the sale of the property would not necessarily result in the dissolution of the corporation. Although KTK would lose its principal physical asset (the property) as a result of this sale, it would receive $1.25 million in return and, in theory, could invest these proceeds or purchase other property. Mazur fails to explain either how the sale of the property would automatically result in the dissolution of KTK or why the trial court could not authorize the sale of a solvent corporation's property when the sale would not automatically cause the corporation to dissolve, nor does he provide authority to support these positions. Accordingly, Mazur fails to provide proper authority to support his arguments that the trial court did not have the authority to sell the property and that the court's order to sell the property before trial acted as an improper grant of summary disposition, and we need not consider this argument further. *Mitcham*, *supra* at 203.

Mazur also argues that the trial court erred because it failed to order KTK to purchase Kelly's shares in the corporation pursuant to the terms of the amended shareholder agreement, which required KTK to purchase the shares of a shareholder upon his death or long-term total disability "as declared by the Shareholder and confirmed by independent medical evidence." Mazur claims that Kelly's statement in a deposition that he was disabled was sufficient to establish Kelly's "long-term total disability" and trigger the requirement that KTK must purchase his shares. However, Mazur fails to identify the nature of the disability that Kelly suffers or

[5] In *Solomon*, *supra* at 375, this Court addressed the question whether a doctor suffering from bipolar disorder could recover insurance benefits after surrendering his medical license because he had engaged in sexual misconduct with several female patients.

establish that Kelly has a "long-term total disability." Further, Mazur does not present, and the lower court record does not contain, any independent medical evidence confirming that Kelly suffers from a "long-term total disability." Accordingly, the provisions of the amended shareholder agreement under which KTK would be required to purchase Kelly's shares were not met, and the trial court did not err when it declined to order KTK to purchase Kelly's shares in the corporation.

VI. Default Judgment

Mazur argues that the trial court erred when it entered a default judgment against him and dismissed his remaining claims on October 16, 2006, because the trial court failed to consider less drastic sanctions to punish Mazur for his failure to appear in court on that day. We agree. "A court, in its discretion, may dismiss a case with prejudice or enter a default judgment when a party or counsel fails to appear at a duly scheduled trial. This Court reviews a trial court's decision to dismiss an action under an abuse of discretion standard." *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 506; 536 NW2d 280 (1995) (internal citations omitted).

Entering a default judgment or an order of dismissal is a drastic step that should be taken cautiously. *VandenBerg v VandenBerg*, 231 Mich App 497, 502; 586 NW2d 570 (1998). Therefore, before a trial court dismisses a cause of action or enters a default judgment as a sanction, it must "carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper." *Vicencio*, *supra* at 506. The trial court abuses its discretion if it fails to evaluate all available options on the record. *Id.* at 506-507. The trial court should consider the following non-exclusive list of factors before imposing dismissal as a sanction:

> (1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. [*Id.* at 507.]

In this case, the trial court included nothing in the lower court record indicating that it considered these factors before entering a default judgment and dismissing Mazur's remaining claims. Its failure to do so constitutes an abuse of discretion. Accordingly, we reverse the trial court's order dismissing Mazur's remaining claims and remand this case to the trial court to determine if a less drastic sanction than dismissal is appropriate in this case in light of the *Vicencio* factors. In light of our reversal of the trial court's order entering a default judgment and dismissing Mazur's claims, Mazur's appeal of the trial court's order denying his motion to set aside the default judgment is moot, and we need not address it.

VII. Sanctions

Finally, Mazur argues that the trial court erred when it awarded sanctions to defendants because plaintiffs' claims were not frivolous. The trial court based its award of MCR 2.403(O)(1) case evaluation sanctions and of costs and attorney fees under MCR 2.625(A)(2) and MCL 600.2591 on its involuntary dismissal of Mazur's complaint.

However, as discussed earlier, we reverse the trial court's order entering a default judgment and dismissing Mazur's claims and remand for further proceedings. Therefore, the basis for the trial court's award of case evaluation sanctions, costs, and attorney fees disappears. Case evaluation sanctions are no longer appropriate because a verdict has not yet been rendered on Mazur's claims, and these sanctions must be vacated.

In addition, the trial court's award of sanctions pursuant to MCR 2.625(A)(2) and MCL 600.2591 are no longer appropriate and must be vacated. In light of our reversal of the trial court's October 16 order dismissing Mazur's remaining claims, a prevailing party no longer exists in this case. A timely motion for sanctions is filed within a reasonable period of time after a prevailing party has been determined. *In re Attorney Fees & Costs* (*Septer v Tjarksen*), 233 Mich App 694, 699; 593 NW2d 589 (1999). Because no prevailing party has yet been determined, the trial court's award of sanctions is premature and must be vacated.

The trial court's January 11 order granting summary disposition of plaintiffs' minority oppression and breach of fiduciary duties claims, its order denying plaintiffs' motion to file an amended complaint, its order denying plaintiffs' motion for clarification, and its order authorizing the sale of the property are affirmed. We reverse the trial court's October 16 order entering a default judgment against Mazur and dismissing the remainder of his claims and remand this case for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Donald S. Owens
/s/ Bill Schuette